Filed 3/28/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ISAAC KALONJI, Plaintiff and Appellant, v. WALTER WILLIAMS, II, Defendant and Respondent.	B146693 (Super. Ct. No. BC188142)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul Gutman, Judge. Affirmed.

Tesfaye W. Tsadik for Plaintiff and Appellant.

Michael Levine and George Whitaker for Defendant and Respondent.

INTRODUCTION

Plaintiff Isaac Kalonji appeals from a judgment in favor of defendant Walter Williams, II, personal representative of the Estate of Walter P. Williams, deceased. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 1994, Reid Othman (Othman) filed a complaint in the Alameda County Superior Court against Walter P. Williams (Williams) and Thurmon Little (Little) for breach of contract, common counts, account stated, and negligent and fraudulent misrepresentation. The basis of the complaint was alleged to be an agreement Williams and Little entered into with plaintiff "for goods, services and cash in Oakland, California." Othman and Little were alleged to be residents of, and to do business in, Oakland. Williams was alleged to be an attorney with an office in Los Angeles, who also did business and was associated with an office in Oakland.

The agreement which was the basis of the complaint was attached thereto. Titled "AGREEMENT," it read: "This agreement is entered between Thurman Little and Walter P. Williams, also hereinafter referred to as 'first party', and Reid Othman, also hereinafter referred to as 'second party', by which the first party will pay the amount of $67,000.00 to Reid Othman within six months commencing from the date of the execution of this agreement. This agreement does not constitute a loan and nor has the bearer of such agreement made a loan. Payment is a fee for service rendered. This agreement was executed on this 9th day of April, 1993." The agreement was signed by Little, Williams and Othman. A handwritten addendum signed by Little stated: "This agreement is paid in full by the 9th day of October 1993 or a set charge of 5% per month due on the 9th of each and every month on the bal[ance] or aggreed [*sic*] amount shall be paid to the above[.]"

On February 6, 1995, Othman obtained a default in the action. He obtained a clerk's default judgment on February 9 in the amount of $73,957, which included the $67,000 in the agreement, $6,700 in interest and $257 in costs.

On October 1, 1995, Williams signed a promissory note which read: "I, Walter P. Williams, hereby promise Reid Othman, the judgment creditor in the action entitled Reid Othman v. Walter P. Williams (Alameda Superior Court Case No. 737701-5), that I will satisfy the money judgment entered against me upon settlement of the Texaco cases." The promissory note was witnessed by plaintiff Isaac Kalonji (plaintiff).

Williams died on December 23, 1996. On May 21, 1997, defendant Walter Williams, II (defendant) was appointed administrator of Williams's estate. On December 22, 1997, Othman and Darrell J. Moore (Moore) filed a creditor's claim against the estate as judgment creditor and assignee of the judgment creditor. They sought $94,295.18, including the amount of the judgment plus interest. Defendant filed a rejection of the claim on December 31, 1997.

Plaintiff filed the instant action on March 25, 1998, titled "complaint on rejected claim for damages for breach of contract," under Probate Code section 9354, as the assignee of Othman and Moore. He then filed a first amended complaint, which defendant answered. Defendant also filed a cross-complaint against plaintiff, Othman and Moore. This later was dismissed.

Plaintiff filed a declaration by Othman in conjunction with an application for a right to attach order. Othman stated that Williams "needed money to finance his Texaco cases which occurred in November 1992 in Welmington [*sic*], California. Therefore, in or about June 1993, I loaned money to the late Walter P. Williams and his employee, Thurmon Little. [¶]. . . Both the late Walter P. Williams and Thurmon Little signed a contract wherein they stated that they would repay the loan within a six-month period because they both believed that, within a six-month period, they would settle some Safeway cases which the later [*sic*] Walter P. Williams represented against Safeway Stores, Inc. and which stemmed from a warehouse fire in Richmond, California in 1988

and in which thousands sustained injuries. I knew that Safeway had been settling cases therefore I agreed to make the loan.

". . . About two months later, the late Walter P. Williams called me and indicated to me that he needed to borrow another $10,000 to finance his Texaco cases and, this time, he promised to me that he would repay the first and second loan within the time stated in the contract and that he would additionally give me a bonus. [¶] . . . After several failed attempts to collect from the late Walter P. Williams and/or from Thurmon Little the money which I had loaned to them, I finally commenced an action . . . in the Alameda County Superior Court Case No. 717701 for breach of contract.

Othman added that he obtained a default judgment against Williams and Little. He assigned the judgment to Moore on February 20, 1997. He thereafter learned from plaintiff that Williams had died. He filed a claim against Williams's estate. On March 15, 1998, he and Moore assigned the judgment to plaintiff.

Pursuant to stipulation, plaintiff filed a second amended complaint in this action about March 5, 1999. He set forth causes of action for breach of contract and anticipatory breach of contract under Probate Code section 9354; for fraudulent conveyance under Civil Code sections 3439.04, subdivision (b)(1), and 3439.07, subdivision (a)(1), and Code of Civil Procedure section 425.10; for concealment of material facts; and for intentional misrepresentation.

The breach of contract cause of action was based on the judgment. By it, plaintiff sought $105,021.06: the amount of the judgment plus interest. In the second cause of action for anticipatory breach of contract, plaintiff alleged that defendant knew Williams owed him money and represented to plaintiff that he would pay a claim against Williams's estate for the money. Defendant had not paid or rejected the claim, however. In the third cause of action for fraudulent conveyance, plaintiff alleged defendant fraudulently kept from Williams's estate money from the Texaco cases. The concealment and misrepresentation causes of action arose out of defendant's representations concerning the Texaco cases.

Defendant filed an answer to the complaint denying the allegations and setting forth a number of affirmative defenses. The seventh affirmative defense was based on the doctrine of unclean hands. Defendant alleged the default judgment "was obtained by fraud and for a fraudulent purpose and was entered as a result of a fraud practiced upon the Superior Court of Alameda County." Specifically, although the agreement on which the judgment was based stated that it was not a loan, "the principal amount of $67,000.00 which was payable in 6 months, was a loan transaction disguised to look as a contract for 'services' under which Reid Othman, Plaintiff's assignor, loaned to the decedent the sum of only $27,000.00. In other words, this was a usurious loan transaction perpetrated by a loan shark who demanded to receive interest on his loan at a rate of in excess of 200% per annum."

Plaintiff answered interrogatories in connection with this litigation. In response to interrogatories, he answered that at the time of Williams's death, Williams was indebted to Othman. This answer was based upon a transaction about July 1993 in which Othman gave Williams $27,000. The transaction was evidenced by the agreement signed by Othman, Williams and Little.

Plaintiff was deposed in connection with this litigation. He testified at his deposition that he prepared the agreement at Williams's direction. He, Williams and Little then went to meet with Othman at Othman's store. Once at the store, Othman, Williams and Little signed the agreement. "And in return, Othman gave [Williams] . . . a big brown bag with cash in it." Then plaintiff, Williams and Little left. Plaintiff acknowledged this was the transaction to which he referred in his interrogatories, the one in which Othman gave Williams $27,000.

Plaintiff subsequently filed a declaration in support of a motion for summary judgment. In his declaration, he stated that the judgment he was seeking to collect on "was entered against Walter P. Williams during his lifetime after Walter P. Williams failed to pay back sums that the judgment creditor, Reid Othman, had advanced to Walter P. Williams. These sums included moneys that judgment creditor had actually loaned to Walter P. Williams and a large bonus that the late Walter P. Williams had promised he

would pay to the judgment creditor in recognition of the financial assistance he had received from the judgment creditor."

At trial, plaintiff testified that he, Williams and Little drove to Othman's store with the agreement. Williams, Little and Othman signed the agreement, then Williams "received a bag, a brown bag, and it was cash in it." There was $27,000 to $30,000 in the bag.

Plaintiff then testified that Williams had a business relationship with Othman, who owned grocery stores where he also cashed checks for people. When asked to explain the relationship, plaintiff stated "that Mr. Williams, when he needed any cash -- as I told you before, Mr. Williams' office was in Oakland and he didn't have an office in Oakland -- I mean he had an office in Los Angeles, but not an office in Oakland -- so to pay his bills, he will ask Mr. Reid Othman to write him some checks that Mr. Williams will ask me to go pick up a check from and, like, to pay a telephone bill, or something like that, sometimes to pay some of the employees that he had in Northern California."

When asked what service was performed for which Williams was to pay $67,000 to Othman under the agreement, plaintiff explained that "Mr. Othman had a relationship with a lot of attorneys in the area, in the Oakland area, because there were some lawsuits going on, big lawsuits involving thousands of people, thousands of people; so some of the people, when they couldn't cash their checks because they didn't have I.D.'s, and would bring them to Mr. Othman's store to cash the checks, so Othman will help them cash the checks because the attorney will pledge this is the right person because he doesn't have the I.D.'s." Othman also rented a car for two months for Little, since Little did not have a credit card.

Plaintiff was asked on cross-examination whether the written agreement memorialized a loan by Othman to Williams. Plaintiff replied that he did not know the nature of the dealings between Othman and Williams. When confronted with his deposition testimony, he stated: "This is what I testified to. What I said here is — when you asked me this question now, I told you I don't know what was going on at the time

when Mr. Williams was asking me to type all these paperwork. I didn't know what was going on."

Plaintiff was asked again: "You testified at the deposition about the brown paper bag and the $27,000. My question is, that is the transaction that is memorialized in [the agreement], is it not?" Plaintiff responded: "I don't know that because it doesn't [say] $27,000. I don't know. This agreement says $67,000. And you're asking me the bag that contained the money, is that the same transaction. I don't know that." On further questioning, he acknowledged that Williams's signing the agreement and receiving the bag containing the money occurred at the same time.

Plaintiff was then confronted with his complaint, in which he alleged the agreement was based upon a loan, and asked again whether the agreement was for repayment of a loan rather than for services rendered. He replied: "I think I was not party to the agreement. All I know is that there was a judgment entered into, Mr. Moore and Mr. Othman wanted me to enforce it, and I took it from there." He did not know whether the agreement was for services rendered.

Plaintiff was asked about his declaration, in which he stated that the judgment was for money loaned to Williams "and a large bonus." He answered: "I stated this based on the fact that I know that Mr. Othman gave money to Mr. Williams, brought checks to Mr. Williams, that food was exchanged, car, everything and that was -- the amount represented the $67,000; so it included loans as well as services."

Following trial, the trial court rendered a judgment in favor of defendant. Plaintiff filed a motion for new trial based on insufficiency of the evidence. The trial court denied his motion.

CONTENTIONS

I

Plaintiff contends the evidence does not support a finding of fraud committed upon the Alameda County Superior Court.

II

Plaintiff additionally contends he should be awarded attorney's fees and costs incurred in the enforcement of the judgment.

DISCUSSION

I

Plaintiff contends the evidence does not support a finding of fraud committed upon the Alameda County Superior Court. We disagree.

The trial court issued a statement of decision at plaintiff's request in which it explained the basis for its judgment in favor of defendant. The court found "that it would be inequitable to enforce the Default Judgment against the Estate of Walter P. Williams. . . . In procuring from the Alameda County Superior Court the Default Judgment in the principal amount of $67,000 against the decedent Walter P. Williams, plaintiff's assignor, Reid Othman, had practiced a fraud upon the Alameda Superior Court." Specifically, his complaint "contained a false allegation that the contract, a copy of which was attached to and incorporated into the complaint, and upon which the complaint was based, did not constitute a loan nor had . . . Othman made a loan to Walter P. Williams. The complaint falsely alleged that payment was a fee for services rendered. [¶] . . . In fact, the underlying transaction was a usurious loan in which [Othman] sought

to and, in fact, did obtain a default judgment from the Alameda Superior Court that awarded to Reid Othman interest on the principal sum in excess of 200% per annum."

The trial court explained that it was "not limited in its determination herein to the four corners of the default judgment. It must consider whether the circumstances surrounding the entry of the prior judgment render inequitable its enforcement herein. It is the duty of [the] Court upon suggestion that a plaintiff has not acted in good faith concerning a matter upon which he bases his suit, to inquire into the facts in that regard. [*Fansler v. Fansler* (1988) 206 Cal.App.3d 81, 87.]" Additionally, the court explained that "[i]t would be inequitable for [the] Court to allow Plaintiff Kalonji to establish the validity of a claim against the Estate of Walter P. Williams, deceased, in an amount in excess of $94,000.00, since to do so would constitute an affirmation of a fraud practiced on the Alameda Superior Court, an affirmance of an usurious contract and would deprive the heirs and creditors of the estate of assets available to satisfy their claim[s]. [*Woodcock v. The Petrol Corp.* (1941) 48 Cal.App.2d 652, 657.]"

Where there is a statement of decision containing factual findings and a judgment, the appellate court addresses two separate questions: whether the findings of fact are supported by substantial evidence and whether the judgment is supported by the findings and substantial evidence. (See *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1291.) The trial court's findings of fact will be reversed on appeal only if they are unsupported by substantial evidence. (*Id*. at p. 1289.) Substantial evidence is that which is "'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.'" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, italics omitted.)

We must examine the entire record to determine if there is substantial evidence, contradicted or uncontradicted, which supports the findings. (*Bowers v. Bernards*, *supra*, 150 Cal.App.3d at pp. 873-874.) The trial court, as trier of fact, has the duty to weigh and interpret the evidence and draw inferences therefrom. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598.) We cannot reweigh the evidence or draw contrary inferences. (*Ibid*.) Thus, we must resolve all conflicts in the evidence and draw all reasonable

inferences in favor of the findings. (*Watson v. Department of Rehabilitation*, *supra*, 212 Cal.App.3d at p. 1289.) Additionally, evidence accepted by the trial court as true may not be rejected by the appellate court unless it is physically impossible or its falsity is obvious without resort to inference or deduction. (*Id.* at p. 1293.)

Plaintiff first argues that the finding of fraud is not supported by the evidence but by "speculation and suspicion." Specifically, he claims there is no substantial evidence supporting the findings that Williams promised to pay Othman a bonus, that the agreement was based on a one-time loan, and that the loan never exceeded $27,000.

The trial court made no finding that Williams promised to pay Othman a bonus. The trial court found the agreement documented a loan at a usurious rate of interest. The evidence viewed in the light most favorable to the judgment (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 697) clearly supports an inference that the agreement documented a loan in the principal amount of approximately $27,000, to be paid within six months. It is reasonably inferable that the balance of the $67,000 set forth in the note constituted interest at a usurious rate. That the agreement falsely stated "[t]his agreement does not constitute a loan and nor has the bearer of such agreement made a loan, and "[p]ayment is a fee for service rendered" supports this inference. It is reasonably inferable the purpose of such a false statement was to hide an illegal transaction. Inference is not "speculation and suspicion." It is drawn from the evidence.

The trial court was justified in rejecting plaintiff's in-court testimony to the contrary. First, it was in conflict with his previous answers to interrogatories, deposition and declaration and could be viewed as an attempt to avoid the consequences of those statements, made at a time when he did not realize what the consequences would be. Second, parts of his testimony were incredible.

The gist of plaintiff's testimony was that the $67,000 was for cashing checks for Williams's clients, paying bills for Williams and renting a car for Little to use for two months. Even assuming Williams, an attorney, had no checks or credit cards with which he could pay his own bills and rent a car, the sum could be considered grossly in excess of what these services were worth. This provides a basis for rejecting plaintiff's

testimony. Once rejected by the trial court, this evidence cannot be accepted by the appellate court. (*Watson v. Department of Rehabilitation*, *supra*, 212 Cal.App.3d at p. 1293.)

Plaintiff next argues that the facts recited in the agreement were binding upon defendant and could not be contradicted by parol evidence, relying on Evidence Code section 622. This section provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

Evidence Code section 622 codifies the principle "that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed, and may not thereafter claim that its provisions do not express their intentions or understanding." (*City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1176.) By the terms of the statute, however, this principle does not apply to the recital of consideration in the instrument. Thus, "the consideration recited in the agreement is not conclusive on the parties and . . . the true consideration for the agreement may be established by parol." (*Wilson v. Wilson* (1960) 54 Cal.2d 264, 269.) Defendant therefore was not bound by the recital in the agreement as to consideration of "service rendered" but was entitled to prove by parol evidence that the true consideration for the agreement was a loan. (*Ibid*.)

Plaintiff next argues that defendant should be bound by Williams's failure to challenge the default judgment. As noted in *Woodcock v. The Petrol Corp.*, *supra*, 48 Cal.App.2d 652 and *Fansler v. Fansler*, *supra*, 206 Cal.App.3d 81, on which the trial court relied, an action by a judgment creditor is an equitable proceeding. (*Fansler*, *supra*, at p. 86; *Woodcock*, *supra*, at p. 656.) "Those who come into a court of equity seeking equity must do so with clean hands and a pure conscience." (*Woodcock*, *supra*, at p. 656.) It is not even necessary that the judgment debtor object to the proceeding. If the court believes that the underlying transaction is fraudulent it may investigate the matter. (*Fansler*, *supra*, at p. 86; *Woodcock*, *supra*, at p. 656.) Thus, the trial court was entitled

to investigate the matter and do equity, irrespective of Williams's failure to challenge the default judgment. (*Fansler*, *supra*, at p. 86; *Woodcock*, *supra*, at p. 656.)

The trial court was "not limited in its determination to the four corners of the prior judgment. It [could] consider whether the circumstances surrounding the entry of the prior judgment render inequitable its enforcement . . . ." (*Fansler v. Fansler, supra,* 206 Cal.App.3d at p. 87.) That Williams consented to the perpetration of a fraud upon the Alameda County Superior Court did not preclude the trial court from finding fraud and refusing therefore to enforce the judgment.

Plaintiff argues that, if the evidence supports the finding that the agreement was for a loan in the principal amount of $27,000, the trial court erred in refusing to require defendant to pay that amount to him. The trial court ruled that plaintiff was not entitled to recover this amount, in that the issue of Williams's obligation to repay the loan was not raised in the pleadings or at trial. Neither was a claim for that amount made against Williams's estate. Therefore, the claim was barred under Probate Code sections 9002 and 9104, subdivision (c)(2).

Plaintiff puts forth a number of reasons why it is inequitable not to require defendant to pay him the $27,000. He fails to address the trial court's ruling that it could not enforce the claim against the estate because it was barred for failure to file it against the estate within the statutory time, which had since expired. (Prob. Code, §§ 9002, 9104, (c)(2).) Having failed to demonstrate that the trial court's findings in this regard were incorrect, he has failed to demonstrate error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Watson v. Department of Rehabilitation, supra*, 212 Cal.App.3d at p. 1291.)

II

Plaintiff additionally contends he should be awarded attorney's fees and costs incurred in the enforcement of the judgment. In light of the conclusion reached above, that he is not entitled to a judgment in his favor, we reject this contention.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

I concur:

MALLANO, J.

I concur in the judgment only:

VOGEL (MIRIAM A.), J.